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ABSTRACT

Education in South Africa underwent major changes with the passage of the South African Schools Act of 1996. The details of this act and some of its consequences are outlined in this report. The paper opens with the particulars of the act and delves into the act's wording, asking "What is basic education?" and "What is meant by 'equal access to educational institutions?'" The report then moves to children and school law, focusing on the position of children and the law. The act was intended to abolish the previous racially based education system in South Africa and thus facilitate the democratic transformation of education. Some of the various issues discussed include admission and compulsory attendance; truancy, suspension, and expulsion; corporal punishment and other forms of discipline; indemnity, where parents are exempted from the obligation to pay school fees, which may be determined and charged only if a resolution to do so has been adopted by a majority of parents; allegations of cheating and sexual harassment; and the representative council of learners. (RJM)

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The South African Schools Act of 1996: A Break with the Past

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THE SOUTH AFRICAN SCHOOLS ACT OF 1996: A BREAK WITH THE PAST*

1. Introduction

Education in South Africa underwent major changes with the passing of the South African Schools Act of 1996 (Act 84 of 1996). Before the coming into operation of this Act, there existed in South Africa a number of legislative enactments making provision for separate schools which catered for the education of the different population groups (see Joubert W A (ed) ***The Law of South Africa*** Vol 8 1979 171-218). This was due to the policy of apartheid that was followed by the previous government.

On 27 April 1994 the interim Constitution of 1993 came into operation. It provided, amongst others, for a right to education (section 32 of Act 200 of 1993). This Act was later to be repealed and replaced by the Constitution of 1996 (Act 108 of 1996). It also provides for a right to education in section 29 in the following terms:

> "(1) Everyone has the right -
>
> (a) to a basic education, including adult basic education; and
>
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
>
> (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account -
>
> (a) equity;
>
> (b) practicability; and

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* This is a shortened version of Chapter 9 (by the same author) in Robinson J A (ed) **The Law of Children and minors in South Africa** Butterworths 1997

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(c) the need to redress the result of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that -

(a) do not discriminate on the basis of race;

(b) are registered with the state; and

(c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions."

This measure imposes an obligation on the state to provide education and 'secures a substantive right to basic education' (Kriel R R "Education" in Chaskalson et al ***Constitutional Law of South Africa*** 1995 38). The right to education is a second generation right and sometimes it is referred to as a 'red right'. The right requires the state to take positive action, that is, to make provision for education (Kleyn D and Viljoen F ***Beginners Guide for Law Students*** 1996 239-40, Van der Westhuizen J "A Post-Apartheid Educational System: Constitutional Provisions" 1989 ***Columbia Human Rights Law Review*** 111 115).

What is basic education? Basic education may be described as developing a person to such a stage of literacy so as to enable him or her to be aware of his or her duties and obligations as a citizen (Malherbe E F J "Die onderwysbepalings van die 1993 Grondwet" 1995 ***TSAR*** 1 2). The Constitution also makes provision for a right to further education. The state is obliged to take or design reasonable measures in order to make the right to education progressively available and accessible (section 29(2) of Act 108 of 1996).

The clause relating to 'equal access to educational institutions' is related to the equality provisions of the Constitution. This anti-discriminatory provision of the Constitution, contained in section 9 provides as follows:

> "The state may not discriminate directly or indirectly against anyone on one or more grounds, including, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth."

This section therefore forbids discrimination relating to access to educational institutions. It thus prohibits admission requirements which are discriminatory and obliges the state to consider all reasonable educational alternatives to ensure effective access to educational institutions.

The right to receive education or to instruction in the official language of one's choice in public educational institutions is also guaranteed. This is guaranteed subject to the proviso that such education is reasonably practicable (section 29(2) of Act 108 of 1996). This right is furthermore closely related to section 30 of the Constitution of 1996 which confers upon every person the right to use the language and to participate in the cultural life of his or her choice without violating any provision of the bill of rights.

There are, however, differences between sections 29 and 30 of the Constitution of 1996. The first distinction is that section 29 relates to the use of an official language or languages of one's choice for the purposes of receiving education or instruction. Section 30 on the other hand makes provision for the use of a language of one's choice not for instructional purposes, and to participation in the cultural life of one's choice. Secondly section 29 is confined to the use of an official language whereas section 30 relates to the use of any language, even a language not recognised as an official language by the Constitution. For the purposes of school education, a sign language is regarded as an official language (section 6(4) of Act 84 of 1996).

The right to receive education in the official language or languages of one's choice is limited. The effect of these limitations on the education clause contained in section 32 of the previous Constitution of 1993 has been described as follows:

> "The right is seriously curtailed not only by the limitations clause but also by the express confinement of the right to situations where satisfying this right is reasonably practicable. In other words, a person who does not speak one of the national languages of South Africa and in respect of whom there are relatively few members of his or her linguistic group in the area, cannot demand the establishment of a school giving instruction, for example, in Romanian. Even in regard to national languages it cannot be expected that 11 different language schools must be established in each district in order to satisfy any member of a group which speaks one of the national languages" (Cachalia **et al** ***Fundamental Rights in the Constitution*** 1994 105).

The Constitution also provides for a right to establish and maintain independent educational institutions (section 29(3) of Act 108 of 1996). These educational institutions may be established provided that they:

(a) do not discriminate on the basis of race;
(b) are registered with the state; and
(c) maintain standards that are not inferior to standards at comparable public educational institutions.

This clause does not oblige nor does it require of the state to establish independent educational institutions. It grants individuals the right to establish such institutions. Such institutions may, however, be subsidised by the state (section 29(4) of Act 108 of 1996). The nature of this right was described in ***Ex Parte Gauteng Provincial Legislature: In re Disputes Concerning Certain Provisions of the Gauteng School Education Bill 1995*** 1996 4 BCLR 537 (CC) par 7 as follows:

> [I]t provides a defensive right to a person who seeks redress to establish such educational institutions and it protects that right from invasion by the state ..."

2. Children and school law

As this paper deals with 'children' and 'school law', it is appropriate to define these terms. There are two types of

children in South African law, namely, ***infantes*** and ***impubes***. An ***infans*** is a child below the age of 7 whereas **impubes** refer to children between the ages of 7 and 14 (Barnard H J, Cronje D S P and Olivier P J J ***The South African Law of Persons and Family Law*** 1994 78-9). The South African Schools Act of 1996 does not define the term 'children'. It however, defines the term 'learner' in section 2 as follows:

> "[A]ny person receiving education or obliged to receive education in terms of this Act."

Thus the term 'child' or 'children' refers to a 'learner' or 'learners' as envisaged by the Schools Act of 1996.

School law for the purposes of this paper, relates to the law applicable to schools, more particularly to the Schools Act and regulations made under this Act, as well as the enactments and regulations of the various provinces dealing with this subject matter. The Schools Act and the provincial acts dealing with schooling must be read in the light of the relevant constitutional provisions.

This paper concentrates on the position of children and the law and consequently only those provisions of the Schools Act relevant for this purpose will be dealt with. They are hereinafter discussed.

3. The South African Schools Act of 1996

The main purpose for the introduction of this measure was to abolish the previous racially based education system in South Africa. It provides for a uniform system for the organisation, governance and funding of public schools (see the Preamble to Act 84 of 1996). The Act applies to school education subject to the National Policy Education Act of 1996 (Act 27 of 1996) which was aimed at facilitating the democratic transformation of education into one which serves the needs and interests of all the people

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of South Africa and which upholds their fundamental rights. One of the fundamental rights to be upheld was the right to education (section 3 of Act 27 of 1996).

The Schools Act is divided into seven chapters. The first chapter deals with the definition of words and the application of the Act. Chapter 2 details rules relating, amongst others, to compulsory school attendance, exemption from such attendance and expulsion and suspension from public schools. The rest of the chapters deal with the provision, governance and funding of public schools, the establishment, registration and withdrawal of registration of independent schools as well as transitional provisions.

Two types of schools, namely, public and independent schools may be established. An independent school may be established by a person at his own expense provided that it is registered with the state and does not discriminate on the basis of race (sections 45 and 46 of Act 84 of 1996). Three kinds of public schools are provided for by the Act: ordinary public schools, public schools for learners with special education needs and gender specific schools (section 12 of Act 84 of 1996).

3.1 Admission and compulsory attendance

Schools are required to admit children and to serve their educational needs without discriminating in any way (section 5(1) of Act 84 of 1996, Section 29(3) of Act 108 of 1996, ***Matukane v Laerskool Potgietersrus*** 1996 3 SA 223(T)). They are not authorised to admit children on the basis of an admission test (section 5(2) of Act 84 of 1996). Children may not be refused admission to public schools on the grounds that their parents are unable to pay or have not paid school fees, do not subscribe to the mission statement of the school or have refused to sign a contract which waives any claim for damages arising out of the education of their children (section 5(3) of Act 84 of 1996).

Every child of the age of 7 has to be admitted or enrolled at a school. A child who has been admitted to a school is, unless exempted, obliged to attend, and every parent is obliged to cause every child for whom he is responsible, from the first day of the year in which such child reaches the age of 7 until the last day of the year in which the child reaches the age of 15 or the ninth grade, whichever occurs first, to attend school (section 3(1) of Act 84 of 1996). Children are thus obliged to attend school from the age of 7 until 15 or the ninth grade, whichever occurs first. Parents are also obliged to cause such children to be enrolled at and attend school. Each child is therefore guaranteed education up to the ninth grade irrespective of age.

A parent who, without just cause, fails to enrol his or her child at a school or fails to cause such child to attend school, commits an offence and upon conviction is liable to a fine or imprisonment for a period not exceeding six months. In the same manner, any person who without just cause, prevents a child from attending school also commits an offence (section 3(6) of Act 84 of 1996).

3.2 Truancy, suspension and expulsion

A code of conduct aimed at a disciplined and purposeful school environment and dedicated to the improvement and maintenance of the quality of the learning process, may be adopted by a governing body of a school. This code of conduct is to be adopted after consultation with children, parents and the educators of the school concerned (section 8(1) and (2) of Act 84 of 1996). The code of conduct has to contain provisions of due process which safeguards the interest of children and any other person involved in disciplinary proceedings (section 8(5) of Act 84 of 1996). This implies that the code of conduct has to comply with the provisions of section 33 of the Constitution of 1996 which provides that:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) ..."

A child who does not comply with the code of conduct adopted by his or her school may be suspended or expelled. Suspension may be resorted to after a fair hearing for a period of not longer than a month. Children may be suspended by the governing body only (section 9(1) of Act 84 of 1996). If found guilty of serious misconduct, children may be expelled by the head of the education department. Such expulsion has to take place after a fair hearing (section 9(2) of Act 84 of 1996). A child who has been expelled or the parent of such child, has the right to appeal against such expulsion to the provincial member of the executive council responsible for education (section 9(4) of Act 84 of 1996). No exemption from the obligation to comply with the code of conduct may be granted to any child attending a public school (section 8(4) of Act 84 of 1996). Where a child who is subject to compulsory attendance is expelled from a school, the head of department is obliged to make alternative arrangements for his or her placement at another public school (section 9(5) of Act 84 of 1996).

It is submitted that the pregnancy of a child is not a factor that may lead to suspension or expulsion from the school. Expulsion or suspension based on pregnancy amounts to discrimination in terms of section 9 of the Constitution of 1996 which prohibits unfair discrimination on the basis of, amongst others, pregnancy, gender and sex.

3.3 Corporal punishment and other forms of discipline

In keeping with the bill of rights as contained in the Constitution, corporal punishment of children has been abolished in schools. Any person who administers corporal punishment commits an offence and is liable on conviction to a sentence which could be imposed for assault (section 10 of Act 84 of

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1996). The previous position regarding the ***in loco parentis*** of educators (teachers) has been greatly curtailed in this respect. An educator, whether a teacher or principal of a school, who chastises a child, renders himself guilty of the offence of assault. Infliction of corporal punishment is regarded as cruel, inhuman and degrading treatment. This was explained in ***Ex Parte Attorney General, Namibia: In re Corporal Punishment by Organs of State*** 1991 3 SA 76 (NmSC) 93 G-H as follows:

> "It remains an invasion on the dignity of the student sought to be punished. It is equally clearly open to abuse. It is often retributive. It is equally alienating. It is also equally degrading to the student sought to be punished ..." (See also **S v Williams** 1995 7 BCLR 861 (CC) para 52).

Educators are therefore expected to devise methods of discipline that are not cruel, inhuman or degrading. The methods must be aimed at the positive discipline of children. Before any action aimed at disciplining a child is taken, such child must be granted a fair hearing. The child must thus be informed about the allegations against him or her and granted a reasonable time to prepare his or her defence so that he or she is not unfairly prejudiced. The basic principles relating to a fair hearing are embodied in the common law maxim ***audi alteram partem*** (Boulle L, Harris B and Hoexter C ***Constitutional and Administrative Law: Basic Principles*** 1989 322-8, section 33 of Act 108 of 1996). These principles have been explained in ***Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture*** 1980 3 SA 476(T) 486 F-G as follows:

> "The person concerned must be given a reasonable time in which to assemble relevant information and to prepare and to put forward his representation ... he must be put in possession of such information as will render his right to make representation a real, and not an illusory one."

3.4 Indemnity

It has already been pointed out above that the governing body of a school in consultation with parents, learners (that is children) and educators of the school, has to adopt a code of conduct for the learners (section 8(1) of Act 84 of 1996). Children cannot be exempted or indemnified from the obligation to comply with the adopted code of conduct (section 8(4) of Act 84 of 1996). They may, however, be exempted, partially or conditionally, from compulsory attendance if it is in their best interests (section 4 of Act 84 of 1996).

Parents on the other hand, may be exempted from the obligation to pay school fees by a governing body of a school (section 40 of Act 84 of 1996). Fees may be determined and charged only if a resolution to do so has been adopted by a majority of parents attending a meeting to approve the annual budget (sections 38 and 39 of Act 84 of 1996). Where no exemption for the payment of fees has been granted, parents are obliged to pay school fees (section 40(1) of Act 84 of 1996). Parents are also not obliged to indemnify the school against any claims for damages arising out of the education of their children (section 5(3)(c) of Act 84 of 1996).

Minors, that is children, who are members of a governing body of a school are not authorised to contract on behalf of the governing body nor may they vote on resolutions of the governing body which impose liabilities on third parties or the school (sections 32(1) and (2) of Act 84 of 1996). Furthermore, such minors incur no personal liability for any consequence of their membership of the governing body. This indemnity applies only where such a minor acts within the scope of his or her authority as a member of a governing body. Where he or she acts outside the scope of his or her authority, he or she may be held liable for the consequences of his or her actions. This may be the case when such a minor acted without authority or with malicious intent. As public schools are organs of the state, the state is liable for any damage or loss caused as a result of any act or omission in connection with any educational activity and the

State Liability Act of 1957 (Act 20 of 1957) is applicable (section 60 of Act 84 of 1996).

3.5 Allegations of cheating and sexual harassment

A code of conduct properly adopted by a governing body of a school may provide for a procedure to be followed where children are alleged to have cheated in tests or examinations. The Schools Act provides that a code of conduct must be aimed at establishing a disciplined and purposeful school environment dedicated to the improvement and maintenance of the quality of the learning process (section 8(1) of Act 84 of 1996). Cheating, whether in tests or examinations, it is submitted, is against a disciplined and purposeful school environment dedicated at the improvement and maintenance of the learning process. Normally the rules relating to examinations will also contain provisions to this effect. A child who exposes himself or herself to cheating thus runs the risk of being charged with misconduct in terms of the adopted code of conduct or the rules relating to examinations. The procedure to be followed must comply with the principles of a fair hearing already discussed above.

Sexual harassment may be defined as an act or conduct done on a person contrary to his or her desires and which may result in that person agreeing to a relationship of a sexual nature. Sexual harassment may also be committed orally. It may take place in various ways, amongst others, the fondling of any part of the body, more particularly breasts, buttocks and private parts, indicating by words or conduct to a person that he or she is sensually irresistible and many other forms. Sexual harassment violates the following rights of the victim: right to body (***corpus***), dignity, privacy and feelings (***dignitas***). It may also amount to child abuse or indecent assault.

Sexual harassment may be committed by both males and females. It may be perpetrated by an educator against children of his or her school or by a child against an educator. It may thus amount

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to misconduct on the part of the perpetrator. The same rules relating to a fair hearing discussed above, must be followed in the determination of this form of misconduct.

3.6 Representative council of learners

Learners, that is school children, are authorised by the Schools Act to establish a representative council, formally known as the Students' Representative Council, at every public school enrolling the eighth grade and higher (section 11(1) of Act 84 of 1996). The guidelines for the establishment, election and functions of these representative councils are determined by the member of the executive council responsible for education in a province by notice in the Provincial Gazette (section 11(2) of Act 84 of 1996). A public school for learners with special education needs may be exempted from establishing a representative council of learners (section 11(3) of Act 84 of 1996).

4. Conclusion

The South African Schools Act of 1996 ushered in a new educational dispensation in South Africa. It applies to school education without any distinction as to race, colour, creed or religion. It brought the control of education under a single department of education at national level. Provincial governments, however, still have the authority to legislate on education in respect of non-tertiary education. They therefore have concurrent legislative authority with national government in this respect (section 104 read with schedule 4 of Act 108 of 1996). This means that both national and provincial legislatures may legislate on education, but the authority to legislate on tertiary education is the exclusive domain of the national legislature. The South African Schools Act of 1996 was adopted after a series of consultations with interested persons and

organisations and thus represents the wishes and aspirations of the majority of the South African population.

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